

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO**

EARLE W. KELLY, et. al.

Plaintiffs

v.

**CIVIL NO. 97-2265 (JAG)**

LOCKHEED MARTIN SERVICES GROUP,  
et. al.

Defendants

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U.S. DISTRICT COURT  
SAN JUAN, P.R.

**REPORT AND RECOMMENDATION**

Plaintiff Earle W. Kelly (hereinafter "Kelly") filed an action for employment discrimination and illegal discharge under various federal and state laws against his former employer, defendant Lockheed Martin Service Group (hereinafter "Lockheed"), on August 21, 1997. The only claims currently pending before this Court are Kelly's claim under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., and § 504 of the Rehabilitation Act, 29 U.S.C. § 794(a).<sup>1</sup>

Defendant filed a Motion for Summary Judgment on August 31, 1999 (Docket No. 72), which plaintiffs opposed (Docket No. 73). Thereafter, defendant filed a reply to plaintiff's opposition (Docket No. 74), and plaintiff, in turn, filed a sur-reply (Docket No. 75). The matter was referred for report and recommendation on August 5, 2001 (Docket No. 96).

**SUMMARY JUDGMENT STANDARD**

Rule 56(c), of the Federal Rules of Civil Procedure, sets forth the standard for ruling on summary judgment motions: the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

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<sup>1</sup> Claims under Title I of the ADA and § 504 of the Rehabilitation Act are analyzed under the same standards. See Phelps v. Optima Health, Inc., 251 F.3d 21, 23 (1<sup>st</sup> Cir.2001)(citing EEOC v. Amego, Inc., 110 F.3d 135, 143 (1<sup>st</sup> Cir. 1997)).

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3 show that there is no genuine issue of material fact and that the moving party is entitled to a  
4 judgment as a matter of law. Fed. R. Civ. P. 56(c). The critical question is whether a genuine issue  
5 of material fact exists. A genuine issue exists if there is sufficient evidence supporting the claimed  
6 factual dispute to require a choice between the parties' differing versions of the truth at trial. Morris  
7 v. Government Dev. Bank of Puerto Rico, 27 F.3d 746, 748 (1st Cir. 1994); LeBlanc v. Great Am.  
8 Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993), cert. denied, 511 U.S. 1018 (1994). A fact is material if it  
9 might affect the outcome of the suit under the governing law. Morrissey v. Boston Five Cents Sav.  
10 Bank, 54 F.3d 27, 31 (1st Cir. 1995); Maldonado Denis v. Castillo-Rodríguez, 23 F.3d 576, 581  
11 (1st Cir. 1994). On a motion for summary judgment, the court must view all evidence and related  
12 inferences in the light most favorable to the nonmoving party. See Springfield Terminal Ry. v.  
13 Canadian Pac. Ltd., 133 F.3d 103, 106 (1st Cir. 1997). Nonetheless, the court is free to "ignore  
14 'conclusory allegations, improbable inferences and unsupported speculation. '" Suárez v. Pueblo  
15 International, Inc., 229 F.3d 49, 53 (1<sup>st</sup> Cir. 2000) (citing Medina-Muñoz v. R.J. Reynolds Tobacco  
Co., 896 F.2d 5, 8 (1<sup>st</sup> Cir. 1990)).

16 In order to aid the court in the daunting task of searching for genuine issues of material fact  
17 in the record, this district adopted Local Rule 311.12. See, e.g., Corrada Betances v. Sea-Land  
18 Service, Inc., 248 F.3d 40, 43-44 (1st Cir. 2001); Morales v. Orsleff's EFTE, 246 F.3d 32, 33-35  
19 (1st Cir. 2001); Ruiz Rivera v. Riley, 209 F.3d 24, 27-28 (1st Cir. 2000). This rule, requires, in  
20 relevant part, that a party moving for summary judgment submit, in support of the motion, "a  
21 separate, short concise statement of material facts as to which the moving party contends there is no  
22 genuine issue to be tried and the basis of such contention as to each material fact, properly supported  
23 by specific reference to the record." D.P.R.R. 311.12.

24 It is clearly established in this District that compliance with Local Rule 311.12 is critical,  
25 given that the Court will only consider the facts alleged in the aforementioned 311.12 statements  
26 when entertaining the movant's arguments. See Rivera de Torres v. Telefónica de Puerto Rico, 913  
27 F.Supp. 81 (D.P.R. 1995). Defendant Lockheed filed the requisite 311.12 statement with  
28 appropriate references to the record. On the other hand, plaintiff Kelly has failed to fully comply

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with the requirements of Local Rule 311.12 by filing a lengthy, convoluted and confusing statement replete with conclusory allegations.<sup>2</sup> Plaintiff's noncompliance with the requirements of Rule 311.12 has "caused the Court to waste a considerable amount of time 'ferreting through the record'". See Ruiz v. Caribbean Restaurants, Inc., 54 F.Supp.2d 97, 102 (D.P.R. 1999). See also Dominguez v. Eli Lilly & Co., 958 F.Supp. 721, 727 (D.P.R. 1997)(citing Stepanishen v. Merchants Despatch Transp. Corp., 722 F.2d 922, 930-931 (1<sup>st</sup> Cir. 1983)).

In view of the aforementioned, the Court will outline the relevant facts of the case in the light most favorable to plaintiff Kelly. However, the Court will not consider the conclusory allegations and assertions in Kelly's defective 311.12 statement.

#### **FACTUAL BACKGROUND**

Defendant Lockheed<sup>3</sup> was a federal contractor for the U.S. Navy engaged in providing support operations to the Atlantic Fleet Weapons Training Facility ("AFWTF")<sup>4</sup> at Roosevelt Roads Naval Station ("Roosevelt Roads"). Lockheed operated an MK 30 Shop which oversaw the preparation, launching, recovery and maintenance of target drones used by the U.S. Navy in target practices. Plaintiff Kelly, who was assigned to the MK 30 Shop in the position of weapon's technician/launch master, was responsible for the preparation, launching and recovery of MK 30

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<sup>2</sup> As a way of illustrating plaintiff's non-compliance with Rule 311.12, it should be noted that contested fact number three (3) in his 311.12 statement is four (4) pages long. Contested fact number eight (8), in turn, is two (2) pages long. Certainly, this is anything but short and concise.

<sup>3</sup> Plaintiff, in its opposition, has included a full description of defendant Lockheed Martin's enterprise, its broad range of activities, employees and earnings. (See Docket No. 73, Exhibits B, C and D).

<sup>4</sup> On December 1, 1996, pursuant to a bid award granted by the U.S. Navy, ITT Federal Services Corporation ("ITT") assumed the service contract for the operation of the AFWTF project. ITT offered employment only to 15 of the 35 active Lockheed employees assigned to the MK 30 Shop. (See Docket No. 72, Attachment B).

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2 targets.<sup>5</sup> Kelly's tasks also included the loading and unloading of the targets from the support  
3 vessels, in order to launch and recover the drones, and provide maintenance to the launchers. (See  
4 Docket No. 72, Attachment B, and Mr. Kelly's deposition, Attachments C-F).

5 There is a discrepancy in the parties' portrayal of plaintiff Kelly's position. Defendant  
6 Lockheed characterizes the launch master position as a "physically demanding" job, which requires  
7 heavy lifting. In addition, defendant contends that there are no "light duty" positions<sup>6</sup> at the MK 30  
8 Shop, since the launch master position is considered to be a heavy duty assignment, in light of the  
9 rigorous nature of the sea borne operations. (See Docket No. 72, Attachment B). On the other hand,  
10 plaintiff insists that the launch master position is more technical than physical, and that the "heavy  
11 lifting" is done with the aid of some special equipment and not by the launch master. (See Docket  
12 No. 73, Exhibits H, pp.46-49). In support of this contention, plaintiff Kelly has presented evidence  
13 indicating that while employed at Lockheed he did perform his duties as a launch master in a  
14 satisfactory fashion. (See Docket No. 73, Exhibit G, Facundo Troche's deposition).

15 Defendant contends, and plaintiff does not contest, that plaintiff Kelly took several leaves  
16 of absence as a result of various work and non-work related incidents. The dates of said leaves are:  
17 9/18/91 through 11/12/91 (workers' compensation); 3/17/92-6/15/92 (sick leave/short-term  
18 disability); 10/11/92-1/25/93 (workers' compensation); 10/3/94-10/24/94 (workers' compensation);  
19 5/23/95-6/19/95 (sick leave/short-term disability); 7/12/95-1/12/96 (workers' compensation);  
20 3/18/96-9/18/96 (workers' compensation). (See Docket No. 72, Attachment A, Exhibit B).

21 The summary judgment record shows that plaintiff Kelly had a 20 (twenty) pounds lifting  
22 restriction and defendants were aware of it. It is further undisputed that Kelly suffered a work  
23 related accident on January 19, 1996, when he fell backwards from a crane and re-injured his back

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25 <sup>5</sup> MK-30 (drones) are torpedo shaped targets which are twenty feet long, 21 inches in  
26 diameter and weigh 2,700 pounds.

27 <sup>6</sup> Although defendant contends that it did not have a formal "light-duty" policy for  
28 employees who suffered non-occupational or work-related injuries, they did consider the feasibility  
of "light duty" assignments, on a case by case basis. (See Docket No. 72, Attachment A).

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2 and stressed hernias.<sup>7</sup> On March 18, 1996, Mr. Kelly was placed on a worker's compensation paid  
3 leave of absence<sup>8</sup>, due to complications related to the January 19<sup>th</sup> incident. In a letter dated October  
4 9, 1996, and in accordance with defendant's workers' compensation absence policy, Mr. Kelly was  
5 dismissed as an active employee due to his inability to return to work since March 18, 1996. (See  
6 Docket 72, Attachment A, Exhibit III, letter by Minerva Donato). Additionally, the record shows  
7 that Kelly was advised of his right to request long term disability ("LTD") benefits. (See Docket No.  
8 72, letter of October 29, 1996 included in Attachment A).

9 Defendant asserts that it is the Company's policy to automatically dismiss employees who  
10 have been on a continuous six (6) months leave, such as Kelly. This policy, which had been in effect  
11 since March 1995 in other Lockheed locations, was made effective to the AFWTF project in early  
12 January 1996.<sup>9</sup> Plaintiff Kelly was reminded of the permissible amount of leave under the policy  
13 in a letter sent by Minerva Donato, Lockheed's Human Resources Representative, dated July 31,  
14 1996. (See Docket No. 72, Attachments A and J).

15 As a result of his injuries plaintiff Kelly was deemed to have been wholly disabled and  
16 awarded longshore and harbor workers' compensation benefits from March 18, 1996 to April, 1997.  
17 (See Docket No. 72, Attachment I). Thus, Mr. Kelly received compensation for 57 weeks (March  
18 18, 1996 through April 21, 1997), at \$500.91 per week, for an amount of \$28, 551.68 (See Docket  
19 No. 72, Attachment I). As part of his medical treatment while being on workers' compensation  
20 leave, on March 18, 1996, Mr. Kelly underwent a regime of physical therapy. (See Docket No. 72,  
21 Attachments E and F). Plaintiff recognized in his deposition that he was unable to resume his work

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23 <sup>7</sup> As a matter of exception, plaintiff Kelly was permitted to continue working in "light  
24 duty" tasks after the January 1996 accident. (See Docket No. 72, Attachments A, H and D).

25 <sup>8</sup> During the leave, Mr. Kelly received compensation, in the amount of \$500.00 per  
26 week, from defendant's insurance carrier, CIGNA, in addition to medical insurance. ( See Docket  
No. 72, Attachments A, C, D, I).

27 <sup>9</sup> Plaintiff questions the validity of the six-month policy, however, it is undisputed that  
28 he was notified of the policy at the very latest on July 31, 1996, almost three months prior to the  
termination of his six-month period.

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2 duties at Lockheed until the completion of the aforementioned physical therapy. (Docket No. 72,  
3 Attachment E). Nonetheless, plaintiff Kelly alleges that shortly before the expiration of his  
4 workers' compensation leave in October 1996, he orally requested defendant Lockheed to provide  
5 him with an extension of said leave.

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ADA

8 "To obtain relief under the ADA, a plaintiff must demonstrate that: (1) he was disabled  
9 within the meaning of the Act; (2) he was a qualified individual, i.e. able to perform the essential  
10 functions of the position with or without reasonable accommodations; and (3) he was discharged  
11 because of his disability." See Kvorjak v. Maine, 259 F.3d 48, 54 (1<sup>st</sup> Cir. 2001)(citing Ward v.  
12 Mass Health Research Inst., Inc., 209 F.3d 29, 33 (1<sup>st</sup> Cir. 2000)). For purposes of its summary  
13 judgment motion, defendant Lockheed concedes that plaintiff Kelly meets the statutory definition  
14 of disability. (See Docket No. 72, Memorandum, p. 4). See, e.g., Gelabert-Ladenheim v. American  
15 Airlines, Inc., 252 F.3d 54 (1<sup>st</sup> Cir. 2001)(discussing whether an employee is "disabled" within the  
16 meaning of the ADA). In this case, the dispute centers on the second inquiry, whether Kelly was a  
17 *qualified individual* under the ADA. In particular, whether plaintiff Kelly could perform the essential  
18 functions of his position if given reasonable accommodations by defendant Lockheed.

19 Title I of the ADA provides that a covered employer must make reasonable accommodations  
20 to the known physical or mental limitations of an otherwise qualified individual with a disability'  
21 as long as that disability persists, unless and until those accommodations impose an undue hardship  
22 on the employer. 42 U.S.C. § 12112(b)(5)(A). Such accommodations can take various forms, and  
23 the duty to accommodate is an ongoing responsibility that is not exhausted by a single effort on the  
24 employer's part Navarro v. Pfizer Corp., 261 F.3d 90, 101 (1<sup>st</sup> Cir. 2001)(citing Garcia-Ayala v.  
25 Lederle Parenterals, Inc., 212 F.3d 638, 648 n.12 (1<sup>st</sup> Cir. 2000)). Plaintiff Kelly has the burden of  
26 showing that he is a *qualified individual* under the Act. See, e.g., Garcia-Ayala v. Lederle  
27 Parenterals, Inc., 212 F.3d at 646. See also Criado v. IBM Corp., 145 F.3d 437, 443 (1<sup>st</sup> Cir. 1998).  
28 The analysis of whether an individual is qualified or not involves a two-prong inquiry: "first, whether



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2 the individual can perform the essential functions of [his] position; and second, if [he] is unable to  
3 perform those essential functions, whether any reasonable accommodation by [his] employer would  
4 allow [him] to do so.” Phelps v. Optima Health, Inc., 251 F.3d 21, 25 (1<sup>st</sup> Cir. 2001). See also  
5 Soto-Ocasio v. Federal Express Corp., 150 F.3d 14, 18 (1<sup>st</sup> Cir. 1998).

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7 **I. Essential Functions:**

8 An “essential function” is a fundamental job duty of the position at issue. Kvorjak v. Maine,  
9 259 F.3d at 55 (citing Ward, 209 F.3d at 34; 29 C.F.R. § 1630.2(n)(1)). In this case, both plaintiff  
10 Kelly and defendant Lockheed have presented a great deal of evidence in support of their conflicting  
11 versions of Kelly’s essential functions as a launch master, i.e., what exactly were Kelly’s duties and  
12 whether or not he could perform them. In addition, the record shows that during Kelly’s long history  
13 of employment with defendant, he was unable in several occasions to fulfill his duties due to his  
14 disability and was placed by Lockheed on “light duty”. In instances where an employer and an  
15 employee have made arrangements to account for the employee’s disability, a court must evaluate  
16 the essential functions of the job without considering the effect of the special arrangements. Phelps  
17 v. Optima Health, Inc., 251 F.3d at 25 (citing Batish v. Cook County, 241 F.3d 919, 930 (7<sup>th</sup> Cir.  
18 2001)). In other words, “evidence that accommodations were made so that an employee could  
19 avoid a particular task ‘merely shows the job could be restructured, not that [the function] was non-  
20 essential’. . . .To do otherwise would unacceptably punish employers from doing more than the  
21 ADA requires, and might discourage such an undertaking on the part of the employers.” Phelps v.  
22 Optima Health, Inc., 251 F.3d at 26. (citations omitted).

23 There seems to be no question that during the course of his employment relationship with  
24 defendant, Kelly could not only perform his job as a launch master but also that he was good at it.  
25 Nonetheless, Kelly misconstrues his burden of proof under the ADA: “[i]t is plaintiff’s burden to  
26 prove that at the time [he] thought to resume [his] job, [he] had the ability to perform the essential  
27 functions” of his job. See Soto-Ocasio v. Federal Express Corp., 150 F.3d at 18. This he has failed  
28 to do. Kelly has not set forth evidence suggesting that at the time he was terminated, October 1996,

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2 he was able to perform the essential functions of his job with or without reasonable  
3 accommodations. In fact, Kelly himself stated in his deposition that he was unable to resume his  
4 work duties while he was on physical therapy, and that he was in fact on therapy at the time that he  
5 was terminated by defendant. (See Docket No. 72, Kelly's deposition, Attachment E, pp. 17-18, 98-  
6 99).

7 Furthermore, at the time of Kelly's dismissal, he was receiving longshore and harbor  
8 workers' compensation benefits as a result of his injuries and had been deemed to be wholly disabled  
9 and thus precluded from performing any type of work from March 18, 1996 through April 21, 1997.  
10 (See Docket No. 72, Attachment I). The First Circuit has stated that "if an ADA plaintiff was  
11 receiving, during the time [he] claims to have been denied reasonable accommodation, total  
12 disability benefits that were predicated on [his] *inability* to perform the job, then, to defeat a motion  
13 for summary judgment, [he] must make some type of showing that [he] was in fact *able* to perform  
14 the essential functions of [his] job during the time in question." See Soto-Ocasio v. Federal Express  
15 Corp., 150 F.3d at 19-20. Because Kelly failed to make an affirmative showing of his ability to  
16 perform the essential functions of his position at the relevant point in time, there is no genuine issue  
17 of material fact as to whether he is a 'qualified individual' under the ADA.

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19 **II. Reasonable Accommodations:**

20 Even though the record shows that Kelly was unable to perform the essential functions of  
21 his position at the time of his termination, this Court will nonetheless discuss the issue of  
22 "reasonable accommodations," given that plaintiff has alleged that he made numerous requests to  
23 defendant Lockheed to provide him with "reasonable accommodations".<sup>10</sup> The ADA's "reasonable  
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25 <sup>10</sup> "In order to prove 'reasonable accommodation,' a plaintiff needs to show not only  
26 that the proposed accommodation would enable [him] to perform the essential functions of [his job],  
27 but also that, at least on the face of things, it is feasible for the employer under the circumstances.  
28 . . . If plaintiff succeeds in carrying this burden, the defendant then has the opportunity to show that  
the proposed accommodation is not feasible as it appears but rather that there are further costs to be  
considered, certain devils in the details." Reed v. Lepage Bakeries, Inc., 244 F.3d, 254, 259 (1<sup>st</sup> Cir.



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2 accommodation requirement usually does not apply unless 'triggered by a request' from the  
3 employee. . . The employee's request must be 'sufficiently direct and specific.'" Reed v. Lepage  
4 Bakeries, Inc., 244 F.3d, at 260-61 (citations omitted).

5 As previously mentioned, plaintiff Kelly makes numerous references to different instances  
6 during his long employment relationship with Lockheed in which he allegedly asked for "reasonable  
7 accommodations."<sup>11</sup> However, the only "reasonable accommodation" that is relevant to the present  
8 inquiry is the one that Kelly allegedly made at the time of his termination in October of 1996, after  
9 being on leave for over six (6) months. The record shows that Kelly made a verbal request for an  
10 extension of his medical leave, and that he did not provide a definite date for his return, but rather  
11 said that he would return to work when his doctors would allow him to do so.

12 True enough, "[s]ome employees, by the nature of their disability, are unable to provide an  
13 absolutely assured time for their return to employment, [and] that does not necessarily make a  
14 request for leave to a particular date indefinite." See Garcia-Ayala v. Lederle Parenterals, Inc., 212  
15 F.3d at 648. By characterizing his request for an extended leave in a similar fashion to that of the  
16 plaintiff in Garcia-Ayala, plaintiff Kelly invites this Court to conclude that "while the burden of  
17 showing reasonable accommodation is on [him], this is a case in which the employer did not contest  
18 the reasonableness of the accommodation except to embrace a *per se* rule that any leave beyond its  
19 [six-month] period was too long." See Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 648-49.  
20 However, unlike the plaintiff in Garcia-Ayala, Kelly did not provide Lockheed with a specific date  
21 of return when he requested the additional leave. Therefore, by giving defendant Lockheed no  
22 indication as to when he might be able to return to work, plaintiff Kelly was in essence demanding  
23 that his job be held open indefinitely.

24 \_\_\_\_\_  
25 2001).

26 <sup>11</sup> The record shows that plaintiff Kelly appears to have made different requests for  
27 "accommodations" during the time of his employment with Lockheed. (See e.g., Docket No. 73,  
28 Exhibit J, pp. 142-47; Exhibit H, pp. 53-57; Exhibit I, pp 193-203; Exhibit J, pp. 9-18, 25-25, 39-46,  
132-135). However, not only were these requests extremely vague, but more importantly they are  
not relevant to whether or not Kelly was in fact a *qualified individual*, by being able to perform his  
job with a reasonable accommodation **at the time of his discharge.**

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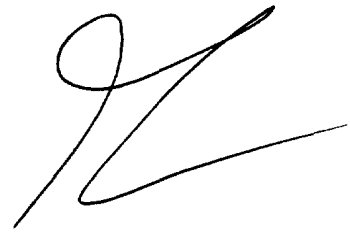
2 CONCLUSION

3 Because plaintiff Kelly has not presented sufficient evidence to meet his burden of showing  
4 that he could perform the essential functions of his position, with or without reasonable  
5 accommodations, the Court hereby **RECOMMENDS** that defendant's summary judgment motion  
6 (Docket No. 72) be **GRANTED** and plaintiff's complaint be **DISMISSED** in its entirety.

7 Under the provisions of Rule 510.2, Local Rules, District of Puerto Rico, any party who  
8 objects to this report and recommendation must file a written objection thereto with the Clerk of the  
9 Court within ten (10) days of the party's receipt of this report and recommendation. The written  
10 objections must specifically identify the portion of the recommendation, or report to which objection  
11 is made and the basis for such objections. Failure to comply with this rule precludes further  
12 appellate review. See Thomas v. Arn, 474 U.S. 140, 155 (1985), reh'g denied, 474 U.S. 1111(1986);  
13 Davet v. Maccorone, 973 F.2d 22, 30-31 (1<sup>st</sup> Cir. 1992); Paterson-Leitch v. Massachusetts Elec., 840  
14 F.2d 985 (1<sup>st</sup> Cir. 1988); Borden v. Secretary of Health and Human Servs., 836 F.2d 4, 6 (1<sup>st</sup> Cir.  
15 1987); Scott v. Schweiker, 702 F.2d 13, 14 (1<sup>st</sup> Cir. 1983); United States v. Vega, 678 F.2d 376, 378-  
16 79 (1<sup>st</sup> Cir. 1982); Park Motor Mart, Inc. Ford Motor Co., 616 F.2d 603 (1<sup>st</sup> Cir. 1980).

17 At San Juan, Puerto Rico, this 24<sup>th</sup> day of October, 2001.

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GUSTAVO A. GELPI  
United States Magistrate-Judge